



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2021-0837; FRL-10029-01-R6]

Air Plan Approval; New Mexico; Clean Air Act Requirements for Nonattainment New Source Review Permitting for the 2015 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the New Mexico State Implementation Plan (SIP) submitted by the State of New Mexico on August 10, 2021, that update the New Mexico Nonattainment New Source Review (NNSR) permitting program for the 2015 8-hour ozone National Ambient Air Quality Standards (NAAQS).

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2021-0837, at <https://www.regulations.gov> or via email to wiley.adina@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not

consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Adina Wiley, (214) 665-2115, wiley.adina@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov. While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Adina Wiley, EPA Region 6 Office, Air Permits Section (ARPE), 214-665-2115, wiley.adina@epa.gov. Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office may be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

I. Background

Ozone is a gas that is formed by the reaction of Volatile Organic Compounds (VOC) and Oxides of Nitrogen (NO_x) in the atmosphere in the presence of sunlight. These precursors (VOC and NO_x) are emitted by many types of pollution sources, including point sources such as power plants and industrial emissions sources; on-road and off-road mobile sources (motor vehicles and engines); and smaller residential and

commercial sources, such as dry cleaners, auto body shops, and household paints, collectively referred to as area sources.

On October 1, 2015, the EPA revised both the primary and secondary ozone NAAQS¹ from a concentration level of 0.075 part per million (ppm) to 0.070 ppm to provide increased protection of public health and the environment (80 FR 65296, October 26, 2015). The 2015 8-hour ozone NAAQS retains the same general form and averaging time as the 0.075 ppm NAAQS set in 2008. Specifically, the 2015 8-hour ozone NAAQS is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentrations is less than or equal to 0.070 ppm.²

On March 9, 2018 (83 FR 10376), the EPA published the Classifications Rule that prescribes how the statutory classifications will apply for the 2015 8-hour ozone NAAQS, including the air quality thresholds for each classification category and attainment deadline associated with each classification.

On June 4, 2018 (83 FR 25776), the EPA designated the Sunland Park Area in southern Doña Ana County, New Mexico as marginal nonattainment for the 2015 8-hour ozone NAAQS with an attainment deadline of August 3, 2021.³ On November 30, 2021 (86 FR 67864), the EPA expanded the marginal nonattainment area that previously only included the Sunland Park Area in Doña Ana County, New Mexico to also include El Paso County, Texas and renamed the marginal nonattainment designated area as the El Paso-Las Cruces, TX-NM nonattainment area.

¹ The primary ozone standards provide protection for children, older adults, and people with asthma or other lung diseases, and other at-risk populations against an array of adverse health effects that include reduced lung function, increased respiratory symptoms and pulmonary inflammation; effects that contribute to emergency department visits or hospital admissions; and mortality. The secondary ozone standards protect against adverse effects to the public welfare, including those related to impacts on sensitive vegetation and forested ecosystems. *See* CAA Section 109(b).

² For a detailed explanation of the calculation of the 3-year 8-hour average, see 80 FR 65296 and 40 Code of Federal Regulations (CFR) part 50, appendix U.

³ The specific portion of New Mexico included in the nonattainment area is defined as the area bounded on the New Mexico-Texas state line on the east, the New Mexico-Mexico international line on the south, latitude N31°49'0" on the north, and longitude W106°36'36" on the west. See 83 FR 25776, 25820.

On December 6, 2018 (83 FR 6299), the EPA published the Nonattainment Area SIP Requirements rule that establishes the minimum elements that must be included in all nonattainment SIPs, including the requirements for NNSR permitting.

On August 10, 2021, the New Mexico Environment Department (NMED) submitted a SIP revision to the New Mexico NNSR permitting program to address the requirements of the 2015 8-hour ozone NAAQS.

II. The EPA's Evaluation

A NNSR permitting program for ozone nonattainment areas is required by the CAA section 182(a)(2)(C). The NNSR requirements are further defined in 40 CFR part 51, subpart I (Review of New Sources and Modifications). NNSR permits for ozone authorize construction of new major sources or major modifications of existing sources of NO_x or VOC in an area that is designated nonattainment for the ozone NAAQS. New major sources or major modifications at existing sources in an ozone nonattainment area must comply with the lowest achievable emission rate (LAER) and obtain sufficient emission offsets for emissions of NO_x or VOC. Emissions thresholds and pollutant offset requirements under the NNSR program are based on the nonattainment area's classification. For Marginal ozone nonattainment areas, major sources are any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 100 tons per year of NO_x or VOC (CAA sections 182(a) and 182(f)). The NNSR offset ratio for Marginal ozone nonattainment areas must be at least 1.1 to 1 (CAA section 182(a)(4)). NNSR programs must also provide the opportunity for public involvement in the permitting process through notification of the proposed actions and providing review and comment periods to the public (40 CFR 51.165(i)).

A. Evaluation of the revisions to the New Mexico NNSR regulations.

The current federally approved New Mexico SIP includes an NNSR permitting program at 20.2.79 New Mexico Administrative Code (NMAC). Upon designation of the Sunland Park area as Marginal nonattainment, the NMED initiated an internal review of the New Mexico NNSR permitting rules and determined their rules would need to be updated to maintain consistency with the Federal NNSR permitting requirements at 40 CFR 51.165. New Mexico adopted these updates on July 21, 2021. These updates were submitted to the EPA on August 10, 2021, as a revision to the New Mexico SIP.

Following is a summary of our analysis of the August 10, 2021, submitted revisions.

Please refer to the Technical Support Document for this proposed action, available in the rulemaking docket, for the full detailed analysis.

- Section 20.2.79.5 NMAC was revised to include the current effective date of the New Mexico regulations of August 21, 2021. This non-substantive revision is approvable and necessary to keep the New Mexico SIP updated with the current New Mexico regulations.
- Section 20.2.79.7 NMAC was revised to update the definitions used throughout the New Mexico NNSR permitting program. The revisions summarized below are substantive edits that are approvable and necessary to maintain consistency with Federal requirements.
 - The definition of “net emissions increase” at 20.2.79.7(Z) NMAC was updated to revise internal cross-references and is consistent with the Federal requirements at 40 CFR 51.165(a)(1)(vi).
 - The definition of “nonattainment area” at 20.2.79.7(AA) NMAC was revised to align with the designation process followed by the EPA under CAA section 107.
 - The definition of “potential to emit” at 20.2.79.7(AE) NMAC was revised to state that secondary emissions do not count in determining the potential to

emit of a stationary source, consistent with the Federal requirements at 40

CFR 51.165(a)(1)(iii).

- Section 20.2.79.9 NMAC was revised to update the address of the NMED, Air Quality Bureau. This non-substantive revision is approvable and necessary to ensure that the public and regulated community can obtain any documents cited in the NNSR regulations.
- Section 20.2.79.109 NMAC was revised at 20.2.79.109(A)(2), 20.2.79.109(E), 20.2.79.109(J), 20.2.79.109(K), and 20.2.79.109(L). The revisions to 20.2.79(A)(2) substantively revise the existing SIP language to mirror the Federal requirements at 40 CFR 51.165(b)(1) and (2). The revisions to 20.2.79.109(E), (J) and (K) are non-substantive revisions to update internal cross-references and clarify existing rule language. The revisions to 20.2.79.109(L) substantively revise the existing SIP language to mirror the Federal requirements at 40 CFR 51.165(a)(9)(iv).
- Section 20.2.79.115 NMAC was revised at 20.2.79.115(F)(1) NMAC to specify that emission reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally creditable for emission offset purposes if the reduction is surplus in addition to being permanent, quantifiable and federally enforceable. This substantive revision is approvable and necessary to ensure that the New Mexico NNSR program is consistent with the Federal requirements at 40 CFR 51.165(a)(3)(ii)(C)(I).
- Section 20.2.79.119 NMAC was revised at 20.2.79.119(B)(7) NMAC to correctly identify the input rate for fossil fuel boilers listed as fugitive emission source categories as 250 million British Thermal Units (mmBTU)/hr instead of 50 mmBTU/hr. This substantive revision is approvable and necessary to ensure the

New Mexico NNSR program is consistent with the Federal requirements at 40 CFR 51.165(a)(1)(iv)(C)(2I).

- Section 20.2.79.120 NMAC was revised at 20.2.79.120(I)(5) to update an internal cross-reference to another portion of the New Mexico NNSR program rules. This revision is approvable and necessary to ensure the permitting program functions as intended.

B. Evaluation of how the New Mexico NNSR Program Satisfies the 2015 8-hour ozone NAAQS Requirements.

The Sunland Park Area in southern Doña Ana County, New Mexico is designated as marginal nonattainment area for the 2015 8-hour ozone NAAQS. Under the SIP-approved requirement at 20.2.79.109(A)(1) NMAC, the New Mexico NNSR permitting program applies to any new major sources or major modifications that will be located within a nonattainment area designated pursuant to Section 107 of the CAA. New major sources or major modifications at existing sources, that emit or have the potential to emit, at least 100 tons per year of NO_x or VOC, are required to comply with the LAER and obtain emission offsets at the Marginal classification ratio of 1.1 to 1. The New Mexico NNSR program at 20.2.79.118 NMAC ensures the public will be notified by advertisement in a newspaper of general circulation in the area in which the proposed major stationary source or major modification will be constructed and provided with a 45-day review and comment period.

Therefore, we propose to find that the New Mexico SIP includes the necessary provisions addressing the CAA NNSR requirements for ozone nonattainment areas classified as Marginal. The New Mexico submittal only addresses the 2015 8-hour ozone requirements for the portion of the El Paso-Las Cruces, TX-NM nonattainment area within the State of New Mexico. The State of Texas is responsible for the portions of

Texas within the same nonattainment area; the EPA will evaluate any submissions from the State of Texas independent of the New Mexico submissions.

III. Proposed Action

Pursuant to section 110 and part D of the Act, we are proposing to approve the submitted revisions to the New Mexico SIP that update the NNSR permitting requirements to maintain consistency with the Federal NNSR program requirements and address the 2015 ozone NAAQS requirements for nonattainment permitting. Specifically, we are proposing to approve the following revisions to the New Mexico SIP adopted on July 21, 2021, effective August 21, 2021:

- Revisions to 20.2.79.5 NMAC – Effective Date,
- Revisions to 20.2.79.7 NMAC – Definitions,
- Revisions to 20.2.79.9 NMAC – Documents,
- Revisions to 20.2.79.109 NMAC – Applicability,
- Revisions to 20.2.79.115 NMAC – Emission Offsets,
- Revisions to 20.2.79.119 NMAC – Tables, and
- Revisions to 20.2.79.120 NMAC – Actuals Plantwide Applicability Limits (PALs).

IV. Environmental Justice Considerations

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and

policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”⁴ The EPA is providing additional analysis of environmental justice associated with this action. We are doing so for the purpose of providing information to the public, not as a basis of our proposed action.

When the EPA establishes a new or revised NAAQS, the CAA requires the EPA to designate all areas of the U.S. as either nonattainment, attainment, or unclassifiable. Consistent with Executive Order 12898, area designations address environmental justice concerns by ensuring that the public is properly informed about the air quality in an area. The EPA addressed environmental justice concerns related to our designation of the Sunland Park Area of Doña Ana County, New Mexico as marginal nonattainment in our June 4, 2018, final rule. If an area is designated nonattainment of the NAAQS, the CAA requires the state authority to establish a nonattainment permitting program that will assist the area in attaining the NAAQS.

For this proposed action, the EPA conducted screening analyses using the EJScreen (Version 2.0) tool to provide additional information to the public regarding the environmental and demographic indicators within the Sunland Park Area of Doña Ana County, New Mexico in the El Paso-Las Cruces 2015 8-hour Ozone Nonattainment area. EJScreen is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining various environmental and demographic indicators.⁵ The EJScreen tool presents these indicators at a Census block group (CBG) level or a larger user-specified “buffer” area that covers multiple

⁴ <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>

⁵ The EJScreen tool is available at <https://www.epa.gov/ejscreen>.

CBGs.⁶ An individual CBG is a cluster of contiguous blocks within the same census tract and generally contains between 600 and 3,000 people. EJScreen is not a tool for performing in-depth risk analysis, but is instead a screening tool that provides an initial representation of indicators related to environmental justice and is subject to uncertainty in some underlying data (*e.g.*, some environmental indicators are based on monitoring data which are not uniformly available; others are based on self-reported data).⁷ We present EJScreen environmental indicators to help screen for locations where residents may experience a higher overall pollution burden than would be expected for a block group with the same total population. These indicators of overall pollution burden include estimates of ambient particulate matter (PM_{2.5}) and ozone concentration, a score for traffic proximity and volume, percentage of pre-1960 housing units (lead paint indicator), and scores for proximity to Superfund sites, risk management plan (RMP) sites, and hazardous waste facilities.⁸ EJScreen also provides information on demographic indicators, including percent low-income, communities of color, linguistic isolation, and less than high school education.

On June 27, 2022, the EPA conducted a review of the EJScreen reports for the approximate 24 square miles contained in the portion of the ozone nonattainment area within Sunland Park, New Mexico. The complete report is available in the public docket for this action. The Environmental Justice Index for eight of the twelve EJScreen indicators exceed the 80th percentile in the United States; seven of the twelve EJScreen indicators exceed the 80th percentile in the State of New Mexico. Five of the twelve

⁶ See <https://www.census.gov/programs-surveys/geography/about/glossary.html>.

⁷ In addition, EJScreen relies on the five-year block group estimates from the U.S. Census American Community Survey. The advantage of using five-year over single-year estimates is increased statistical reliability of the data (*i.e.*, lower sampling error), particularly for small geographic areas and population groups. For more information, see https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs_general_handbook_2020.pdf.

⁸ For additional information on environmental indicators and proximity scores in EJScreen, see “EJSCREEN Environmental Justice Mapping and Screening Tool: EJSCREEN Technical Documentation,” Chapter 3 and Appendix C (September 2019) at https://www.epa.gov/sites/default/files/2021-04/documents/ejscreen_technical_document.pdf.

indicators exceed the 90th percentile in both the State of New Mexico and the United States, including indices for particulate matter 2.5, ozone, air toxics cancer risk, air toxics respiratory, and wastewater discharge. This analysis showed an approximate population of 13,051 residents based on the 2010 Census. Within this area, EJScreen identified that approximately 98% of the population are people of color with 71% identified as low income. Additionally, approximately 38% of the population is linguistically isolated and 40% of the population has less than a high school education.

This proposed action addresses a revision to the New Mexico NNSR permitting program that will apply in the Sunland Park Area of Doña Ana County, New Mexico in the El Paso-Las Cruces 2015 8-hour ozone nonattainment area. The New Mexico NNSR permitting program will require new major sources and major modifications at existing sources, that emit or have the potential to emit, at least 100 tons per year of NO_x or VOC, to comply with LAER and obtain emission offsets in a ratio of 1.1 to 1; this should result in a reduction in overall emissions with the introduction of newly permitted major sources and major modifications and improve air quality in the area. Further, the State of New Mexico must provide 30-day public notice for all proposed permitting actions for new major sources and major modifications going through NNSR permitting. The NMED provided public review and comment on the revisions to the New Mexico NNSR permitting program.⁹ The EPA is also providing a 30-day public comment period on our proposed approval of the submitted revisions to the New Mexico NNSR permitting program. For these reasons, this proposed action is not anticipated to have a disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

V. Incorporation by Reference

⁹ The NMED proposed revisions to the New Mexico NNSR Program on April 20, 2021, with a public hearing held on June 25, 2021.

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are proposing to incorporate by reference revisions to the New Mexico regulations as described in the Section III of this preamble, Proposed Action. We have made, and will continue to make, these documents generally available electronically through <https://www.regulations.gov> (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 5, 2022.

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Regional Administrator, Region 6.

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